

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Brooke Lewis	Team: Bias Squad #01	CCRB Case #: 202304298	<input type="checkbox"/> Force <input type="checkbox"/> Discourt. <input type="checkbox"/> U.S. <input checked="" type="checkbox"/> Abuse <input type="checkbox"/> O.L. <input type="checkbox"/> Injury
Incident Date(s) Friday, 05/12/2023 10:00 PM	Location of Incident: 161st Street/Yankee Stadium train station	18 Mo. SOL 11/12/2024	Precinct: 44
Date/Time CV Reported Mon, 05/15/2023 6:38 PM	CV Reported At: CCRB	How CV Reported: On-line website	Date/Time Received at CCRB Mon, 05/15/2023 6:38 PM

Complainant/Victim	Type	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. SGT Weber Wesh	02019	954419	LATE PTRL TD 2

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. PO Salma Akter	14025	960140	TB ATU
2. PO Atmkamrul Hasan	10567	970586	TD 11
3. PO Md Majumder	18455	958859	TD 11
4. PO Barbara Morales	07871	944825	TB ATU
5. SGT Zuel Clement	01794	945594	TD 11

Officer(s)	Allegation	Investigator Recommendation
A . SGT Weber Wesh	Abuse: Sergeant Weber Wesh threatened § 87(2)(b) with the use of force.	
B . SGT Weber Wesh	Abuse: Sergeant Weber Wesh threatened § 87(2)(b) with the use of force.	
C . SGT Weber Wesh	Abuse: Sergeant Weber Wesh arrested § 87(2)(b) unlawfully.	
D . SGT Weber Wesh	Abuse: Sergeant Wesh photographed and/or recorded § 87(2)(b) on an NYPD-issued electronic device.	
E . SGT Weber Wesh	Abuse: Sergeant Weber Wesh took law enforcement action based upon actual or perceived race	

Case Summary

On May 16, 2023, the agency received § 87(2)(b) complaint via the online processing system.

On May 12, 2023, at approximately 10:00PM, § 87(2)(b) entered the 161st Street/Yankee Stadium Subway station by jumping over the turnstile. Sergeant Webber Wesh, of the Transit Bureau Anti-Terrorism Unit, stopped § 87(2)(b) and asked for § 87(2)(b) identification. Sgt. Wesh held pepper spray in his hand, which § 87(2)(b) interpreted as a threat. (**Allegation A: Abuse of Authority**, § 87(2)(g) § 87(2)(b) replied that he did not have identification. Additional officers, including Police Officer Salma Akter, assisted Sgt. Wesh with the stop. Sgt. Wesh asked § 87(2)(b) for his name, and § 87(2)(b) replied, § 87(2)(b) Sgt. Wesh instructed PO Akter to search § 87(2)(b) on her department cellphone. The search returned negative results. Sgt. Wesh interpreted this result to mean that § 87(2)(b) had provided a false name. Sgt. Wesh unholstered his taser and told § 87(2)(b) that this was his “last chance” to provide his legal name. (**Allegation B: Abuse of Authority**, § 87(2)(g) § 87(2)(b) Sgt. Wesh placed § 87(2)(b) in handcuffs. Following a search incident to arrest, Sgt. Wesh recovered two forms of identification from § 87(2)(b) both stating his name is § 87(2)(b) After obtaining identification verifying § 87(2)(b) identity, Sgt. Wesh transported him to the transit district stationhouse in the subway station. (**Allegation C: Abuse of Authority**, § 87(2)(g) § 87(2)(b) was charged with theft of services.

At the stationhouse, § 87(2)(b) banged his head against the wall, causing injury to his head. Sgt. Wesh recorded and photographed § 87(2)(b) injuries on his department cellphone. (**Allegation D: Abuse of Authority**, § 87(2)(g) § 87(2)(b) was transported to the hospital by EMS, and then later transported to Central Booking.

§ 87(2)(b) also alleged that he was racially profiled by Sgt. Wesh during this incident. (**Allegation E: Abuse of Authority – Biased Policing (Race)**, § 87(2)(g) § 87(2)(b)

The investigation obtained body-worn camera footage (**Board Review 6**) as well as photographs and recordings depicting the incident (**Board Review 1**).

Findings and Recommendations

Allegation (A) Abuse of Authority: Sergeant Weber Wesh threatened § 87(2)(b) with the use of force.

Allegation (B) Abuse of Authority: Sergeant Weber Wesh threatened § 87(2)(b) with the use of force .

Allegation (C) Abuse of Authority: Sergeant Weber Wesh arrested § 87(2)(b) unlawfully.

Allegation (D) Abuse of Authority: Sergeant Wesh photographed and/or recorded § 87(2)(b) on an NYPD-issued electronic device.

Civilian Statement

On May 18, 2023, the investigation obtained an official sworn statement from § 87(2)(b) regarding an incident that occurred on May 12, 2023, at approximately 10:00 PM at the 161st Street/Yankee Stadium in the Bronx. (**Board Review 9**).

§ 87(2)(b) stated that when he approached the turnstile area of the 161st Street / Yankee Stadium subway station, there were hundreds of people in the mezzanine because a Yankees game had just ended. Many of these people entered the subway via the emergency gate, and officers did not stop them. § 87(2)(b) jumped the turnstile and immediately observed Sgt. Wesh and approximately four

additional officers observing him. § 87(2)(b) jumped back over the turnstile to the unpaid side. Sgt. Wesh followed § 87(2)(b) and grabbed the left sleeve of his hooded sweatshirt. Sgt. Wesh did not make contact with any portion of § 87(2)(b) body. Sgt. Wesh held his pepper spray but did not point it at § 87(2)(b).

Sgt. Wesh asked § 87(2)(b) to provide his name, and § 87(2)(b) replied that his name was § 87(2)(b) which is his legal name. § 87(2)(b) told Sgt. Wesh that he did not have proof of identification. Sgt. Wesh warned § 87(2)(b) that there would be consequences for giving a false name to police officers. A female officer searched § 87(2)(b) name in her department cellphone, which returned negative results. Sgt. Wesh initially believed that § 87(2)(b) had provided a false name but discovered the search misspelled § 87(2)(b) name. A female officer ran the search with the correct spelling, which again returned negative results.

The officers attempted to place § 87(2)(b) in handcuffs, and § 87(2)(b) resisted by moving his arms and body away from the officers. Sgt. Wesh pointed his taser at § 87(2)(b) which § 87(2)(b) understood to be a threat to use the taser. After approximately 30 seconds of § 87(2)(b) resisting, the officers placed § 87(2)(b) in handcuffs. The officers searched § 87(2)(b) and found his identification in his pocket. The identification stated his name was § 87(2)(b).

The officers took § 87(2)(b) to the stationhouse, where he was searched in front of the desk. § 87(2)(b) was taken to a holding cell, where he banged his head against the wall, causing injury. Sgt. Wesh instructed officers to photograph § 87(2)(b) which § 87(2)(b) felt was a violation of his privacy. § 87(2)(b) did not know if the officers photographed him or recorded him. § 87(2)(b) attempted to turn away to avoid being photographed, but officers grabbed his arms to hold him still while Sgt. Wesh recorded him.

Emergency Medical Services personnel arrived and transported § 87(2)(b) to the hospital. Following the hospital, § 87(2)(b) was transported to Bronx Central Booking where he was charged with theft of services and giving an incorrect name.

Officer Statement

The investigation obtained an official sworn statement from Sgt. Wesh. (**Board Review 13**). Sgt. Wesh was working in the Transit Bureau Anti-Terrorism with Officer Morales and Officer Akter at the Yankee Stadium Subway station. Sgt. Wesh was accompanying officers during a stop of another individual when he observed § 87(2)(b) jump the turnstiles. Sgt. Wesh's statement was largely consistent with § 87(2)(b) statement, with the following additions and exceptions.

Sgt. Wesh stated that § 87(2)(b) refused to provide his identification, and the officers placed § 87(2)(b) in handcuffs because he was under arrest for theft of services. Sgt. Wesh stated § 87(2)(b) was under arrest for theft of services prior to the DAS search. Sgt. Wesh stated it was his intent to bring § 87(2)(b) to the stationhouse and issue a summons in lieu of an arrest at the stationhouse. § 87(2)(b) provided his name after he was placed in handcuffs. § 87(2)(b) name was searched in the Domain Awareness System (DAS), which returned negative results. Sgt. Wesh stated that if a person has a New York State identification, they will appear in the search results even if they have no criminal record. § 87(2)(b) was searched after being placed under arrest, and the search recovered two forms of identification for § 87(2)(b). A New York State Benefits Card and a City of Newark Municipal Identification. Because § 87(2)(b) was already under arrest prior to Sgt. Wesh obtaining his identification, Sgt. Wesh proceeded to take § 87(2)(b) to the stationhouse. Sgt. Wesh stated he cannot "unarrest" someone. Sgt. Wesh stated that he intended to release § 87(2)(b) from the stationhouse with a summons in lieu of an arrest. Sgt. Wesh stated that he never removed his pepper spray or his taser during the incident. (**Board Review 13**). The investigation did not address

this discrepancy during Sgt. Wesh's CCRB statement.

Photographic and Video Evidence

The investigation obtained body-worn camera footage depicting the incident from Sgt. Wesh, PO Akter, Police Officer Atmkamrul Hasan, Police Officer Md Majumder, Police Officer Barbara Morales, and Police Officer Zuel Clement. **(Board Review 6)**. Sgt. Wesh's footage shows that, prior to stopping § 87(2)(b) he participated in two fare evasion stops of individuals who jumped the turnstile like § 87(2)(b) **(Board Review 2, 00:00-4:28)**. In the first, the individual, who appears to be a young white male, is issued a summons by other officers. In the second, Sgt Wesh directs the individual, who appears to be a white female, to exit the paid area of the station, pay the fare by swiping her fare card on the turnstile, and then reenter the station through the turnstile. Sgt. Wesh was overseeing the issuance of the summons to the young white male who had evaded the fare when he observed § 87(2)(b) jump over the turnstile. **(Board Review 2, 4:20-4:30)**

Sgt. Wesh's footage is largely consistent with his statement, with the following additions and exceptions:

- At approximately 7:25, additional officers, including PO Akter, arrive. Sgt. Wesh asks § 87(2)(b) to provide his name and says, "If you do provide your name, we'll just give you a ticket and let you go."
- At approximately 8:00, § 87(2)(b) states his name is § 87(2)(b) and that his date of birth is § 87(2)(b).
- At approximately 9:00, § 87(2)(b) points out other fare evaders and asks why he is being treated differently from other fare evaders. Sgt. Wesh replies that § 87(2)(b) did not stop when Sgt. Wesh asked him to stop.
- At approximately 10:38, Sgt. Wesh asks for § 87(2)(b) to confirm his first and last name again, because the search returned "No results" and that "it can't happen."
- At approximately 11:10, Sgt. Wesh asks § 87(2)(b) if he wants to go to the precinct. § 87(2)(b) asks why he would be taken to the precinct. Sgt. Wesh states it would be because § 87(2)(b) is refusing to provide his first and last name.
- At approximately 12:30, § 87(2)(b) is placed in handcuffs.
- At approximately 14:30, Sgt. Wesh is handed identification obtained from § 87(2)(b) which verifies his first and last name is § 87(2)(b).
- At approximately 15:32, Sgt. Wesh asks if the precinct is downstairs. An officer out of frame replies in the affirmative. Sgt. Wesh states that the officers will take § 87(2)(b) to the precinct.
- At approximately 17:15, inside the precinct with § 87(2)(b) Sgt. Wesh states, "We're going to cut him loose with a summons." **(Board Review 6)**.

At approximately 00:56 of PO Hasan's BWC, the footage depicts Sgt. Wesh holding his pepper spray in his left hand, while he grips the side of § 87(2)(b) hooded sweatshirt near § 87(2)(b) abdomen. § 87(2)(b) has both hands crossed over his chest with his arms tucked into his armpits; he is leaning against the MetroCard machine and is not moving. Upon PO Hasan's arrival, Sgt. Wesh releases his grip from § 87(2)(b) hooded sweatshirt and puts his mace back into his belt. **(Board Review 25)**.

PO Majumder's BWC footage, at approximately 00:55 minutes into the recording, depicts Sgt. Wesh speaking with § 87(2)(b). At 4:20, Sgt. Wesh says that he is going to give § 87(2)(b) one more chance to provide his identifying information. Sgt. Wesh shows § 87(2)(b) something on his

cell phone and says that § 87(2)(b) does not exist and that it can happen. § 87(2)(b) counters that it can and adds that Sgt. Wesh has a “small mind.” As he says this, § 87(2)(b) uses both hands to point to his head, but he then crosses his hands on his chest with his hands under his arms and he leans against a nearby MetroCard machine. § 87(2)(b) occasionally gestures with his hands while speaking with Sgt. Wesh, but he does so with his hands at the level of his abdomen and otherwise holds his crossed hands in front of his body. At 4:48 minutes, Sgt. Wesh asks if § 87(2)(b) has his identification and when § 87(2)(b) responds negatively, Sgt. Wesh says that he will handcuff § 87(2)(b). At 5:14 minutes, Sgt. Wesh tells § 87(2)(b) to put his hands behind his back, but § 87(2)(b) refuses. § 87(2)(b) then uses both hands to raise the hood of his hooded sweatshirt, then clasps his hands while pointing in the direction of PO Majumder, and finally uses both hands to point at himself. § 87(2)(b) does not take any steps during the discussion. At 5:19 minutes into the recording, Sgt. Wesh says, “Last chance,” and then unholsters his yellow taser. Sgt. Wesh holds the taser in front of himself, pointing downward. § 87(2)(b) asks, “Last chance for what?” Sgt. Wesh replies, “Please turn around and put your hand behind your back.” § 87(2)(b) repeatedly asks to speak with Sgt. Wesh’s supervisor and asks why Sgt. Wesh cannot let him go. As he did so, he kept his hands crossed on his chest. At 5:51 minutes in the recording, Sgt. Wesh holsters his taser and asks the officers present for a set of handcuffs. The officers then handcuff § 87(2)(b) (**Board Review 26**).

The investigation also obtained photographs and a video recording taken by Sgt. Wesh on his department cellphone. The photographs depict § 87(2)(b) head injury, his New York State benefits card, and his City of Newark Municipal Identification Card. The recording depicts § 87(2)(b) banging his head against the stationhouse wall. The Newark Municipal Identification Card includes an address and photograph of § 87(2)(b) (**Board Review 1**).

Police Documentation

The investigation obtained a Threat, Resistance, and Injury Worksheet that Sgt. Wesh completed in relation to § 87(2)(b) in-custody injury. (**Board Review 27-29**). One TRI supporting attachment worksheet include a photograph described as a photograph of the contusion to § 87(2)(b) head. (**Board Review 28**). Another TRI supporting attachment contains a video depicting § 87(2)(b) banging his head into the cell wall, causing a contusion to his head. (**Board Review 29**).

The Transit District 11 Command Log contains an entry for the arrest of § 87(2)(b). The sole listed charge is theft of services, noted as “TOS.” (**Board Review 29**).

[§ 87(2)(b)] [§§ 86(1)(3)&(4)] [§ 87(2)(c)]

Rules

Patrol Guide Procedure 221-01 states that force may be used when it is reasonable to ensure the safety of a member of the service or a third person, or otherwise protect life, or when it is reasonable to place a person in custody or to prevent escape from custody. (**Board Review 7**). In all circumstances, any application or use of force must be reasonable under the circumstances. When appropriate and consistent with personal safety, members of the service will use de-escalation techniques to safely gain voluntary compliance from a subject to reduce or eliminate the necessity to use force. In a determination of reasonableness of an officer’s use of force, multiple factors are considered, including the nature and severity of the crime/circumstances, actions taken by the subject and the duration of those actions, immediacy of the perceived threat or harm to any party, whether the subject is actively resisting custody, whether the subject is attempting to evade arrest by flight, number of subjects in comparison to the number of MOS, physical condition and age of the subject in comparison to the MOS, subject’s violent history, if known, presence of hostile

crowd or agitators, and any stimulant or narcotic use that may affect pain tolerance or the likelihood of violence.

Patrol Guide Procedure 221-07, regarding the use of pepper spray, states that “the use of O.C. pepper spray constitutes physical force under New York State Penal Law . . . O.C. pepper spray may be used to gain or maintain control of persons who are actively resisting arrest or lawful custody or exhibiting active aggression, or to prevent individuals from physically injuring themselves, members of the service, or other persons.” “Do not use O.C. pepper spray on subjects who passively resist (i.e. minimal physical action to prevent a member from performing their lawful duty.)” (**Board Review 31**).

Patrol Guide Procedure 221-08, regarding the use of tasers, states it is strictly prohibited to use a taser “as a form of punishment and on persons who passively resist (e.g. going limp, offering no active resistance).” Active resistance is defined as “physically evasive movements to defeat a member of the service’s attempt at control, including bracing, tensing, pushing, or verbally signaling an intention to avoid or prevent being taken into or retained in custody.” (**Board Review 24**).

Patrol Guide Procedure 209-39, regarding Personal Service of Transit Adjudication Bureau Notice of Violation (TAB/NOV) in Lieu of an Arrest for a Qualified Individual, instructs that “[w]hen a person is observed violating a provision of the New York City Transit Rules of Conduct within the New York City Transit System,” the Member of Service should:

1. Take the violator into custody and inform violator of offense committed, unless physical resistance, flight, or other factors render such notification impractical;
2. Request violator show proof of identify and residence.
3. Establish violator’s identity and residence through observation of valid identification documents
4. Request background check of violator through the local Transit District, and/or through the use of a mobile device, using the Domain Awareness System DAS), and
5. Issue a TAB/NOV summons in lieu of an arrest unless:
 - (1) Violator has an active warrant
 - (2) Violator is wanted in connection with an active **INVESTIGATION CARD (PD373-163)** labeled “*Perpetrator – Probable Cause to Arrest*”
 - (3) Violator is charged with other fingerprintable offense(s)
 - (4) Violator is not properly identified or valid residence cannot be ascertained
 - (5) A legitimate law enforcement purpose in addition to the initial violation can be articulated
 - (6) Violator is identified as a TAB Recidivist or Transit Offender (**Board Review 5**).

P.G. 209-39 further provides that if the violator is not eligible to receive a summons based on the criteria outlined above, then they should be removed to the stationhouse or a designated arrest facility. (**Board Review 5**).

Patrol Guide Procedure 221-03, regarding completing Threat, Injury, and Resistance (TRI) reports, instructs officers to “[t]ake digital photographs with Department issued smartphone of visible injuries to subject, civilian, non-member of the service or bystander, and member of the service[.]” (**Board Review 4**).

§ 87(2)(g)

PO Hasan's body-worn camera footage depicts Sgt. Wesh with pepper spray in his hand while he grips § 87(2)(b) hooded sweatshirt. § 87(2)(g) is standing still and not moving. § 87(2)(g)

§ 87(2)(g)

PO Majudmer's footage depicts Sgt. Wesh unholstering his taser and holding it in front of himself, pointed downward, as he tells § 87(2)(b) that this is his "last chance."

§ 87(2)(g)

The BWC shows that § 87(2)(b) was not actively resisting and was instead passively resisting by making no move to comply with instructions to submit to handcuffing, instead leaning on the nearby MetroCard machine. § 87(2)(g)

In his testimony to the CCRB, Sgt. Wesh stated that § 87(2)(b) was placed under arrest for fare evasion and no other reason. § 87(2)(g)

The BWC footage shows that although § 87(2)(b) told Sgt. Wesh that he did not have identification, § 87(2)(b) did provide his first and last name as well as his date of birth prior to being placed in handcuffs. PO Akter, under the direction of Sgt. Wesh, ran several DAS searches of § 87(2)(b) at the scene, which returned negative results. Sgt. Wesh stated several times that if § 87(2)(b) provided his correct first and last name, § 87(2)(b) would receive a summons. § 87(2)(g)

Only after § 87(2)(b) continues to insist that his legal name is § 87(2)(b) does Sgt. Wesh handcuff § 87(2)(b) placing him under arrest. Following a search incident to arrest, Sgt. Wesh obtained two forms of identification for § 87(2)(b) verifying his name and address. (Board Review 6) (Board Review 2).

§ 87(2)(g)

It is undisputed that § 87(2)(b) hit his head against the wall, causing injury to himself. § 87(2)(g) .
The TRI shows that files purporting to be photographic and video evidence of § 87(2)(b) injury were uploaded to the document § 87(2)(g)

Allegation (E) Abuse of Authority: Sergeant Weber Wesh took law enforcement action based upon actual or perceived race.

§ 87(2)(b) felt that he was racially profiled because there were other people of different races evading the fare, and they were not stopped by Sgt. Wesh. § 87(2)(b) also believed he was profiled because Sgt. Wesh believed § 87(2)(b) must have provided a fake name, when a search showed he did not have a criminal record (**Board Review 9**)_____.

NYPD Administrative Guide Section 304-17: Department Policy Prohibiting Racial Profiling and Bias-Based Policing (Board Review 14) defines racial profiling as “a decision to initiate [law] enforcement action against a person [that] is motivated even in part by a person’s actual or perceived race, color, ethnicity or national origin, . . . unless the officer’s decision is based on a specific and reliable suspect description that includes not just race, age, and gender, but other identifying characteristics or information.” In this case, § 87(2)(b) has essentially alleged that both his initial stop for fare evasion and Sgt Wesh’s decision to arrest and remove him to the stationhouse rather than issue him a summons for fare evasion were racially motivated. In addition, if Sgt Wesh’s threats to pepper spray and tase § 87(2)(b) were racially motivated, then Sgt Wesh engaged in racially-biased policing in violation of Admin Guide § 304-17.

Race does not have to be the sole, primary, or predominant motivation for the law enforcement action in question in order to substantiate an allegation of racially biased policing. *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977); *United States v. City of Yonkers*, 96 F.3d 600, 611-12 (2d Cir. 1996); *Floyd v. City of New York*, 959 F.Supp.2d 540, 571 (S.D.N.Y. 2013). If the preponderance of the evidence establishes that the civilian’s race played any role in the officer’s decision making, the racial profiling allegation should be substantiated, regardless of any non-discriminatory reasons the officer gives for their actions. *Yonkers*, 96 F.3d at 612; *Raza v. City of New York*, 998 F.Supp.2d 70, 79-80 (E.D.N.Y. 2013); *Bennett v. Health Sys., Inc.*, 92 A.D.3d 29, 40 (1st Dep’t 2011). Thus, a law enforcement action that is otherwise legally justified (e.g., a vehicle stop supported by probable cause of a traffic violation) can still constitute racial profiling if the officer was motivated at least in part to take the action by the civilian’s actual or perceived race. *See PBA v. City of N.Y.*, 142 A.D.3d 53, 66-67 (1st Dep’t 2016); *Raza*, 998 F.Supp.2d at 79; *Floyd*, 959 F.Supp.2d at 667. (**Board Review 15**).

Because racially discriminatory intent “is rarely susceptible to direct proof,” it is often established through circumstantial evidence. *Millan-Hernandez v. Barr*, 965 F.3d 140, 148 (2d Cir. 2020); *Bennett*, 92 A.D.3d at 40-41. However, rarely is one piece of circumstantial evidence sufficient on its own to establish racially discriminatory intent. The factfinder must instead consider the “totality of the relevant facts.” *Washington v. Davis*, 426 U.S. 229, 242 (1976); *Leblanc-Sternberg v. Fletcher*, 67 F.3d 412, 425 (2d Cir. 1995). Examples of circumstantial evidence to consider include, but are not limited to:

- (i) the sequence of events leading up to the law enforcement actions at issue;

- (ii) the officer's selective enforcement of the law against the complainant but not against an individual from a different racial group who the officer also observed engaging in the same or similar unlawful conduct;
- (iii) the falsity of the officer's non-discriminatory explanations for their actions;
- (iv) officer's violation of law and/or department policies and procedures during the incident in question.
- (v) data showing a pattern of racial disparities in the officer's enforcement activity over time;
- (vi) officer history of prior biased acts or similar misconduct committed against persons from the complainant/victim's racial/ethnic group. (**Board Review 15**).

Each of these categories of evidence is discussed below with respect to Sgt. Wesh.

- (i) *the sequence of events leading up to the law enforcement actions at issue*
- (ii) *selective enforcement of the transit fare evasion rules*

The United States Supreme Court has held that when analyzing claims of racial discrimination, "[t]he specific sequence of events leading up to the challenged decision [] may shed some light on the decisionmaker's purposes." *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. at 267 (**Board Review 15**). Thus, the events leading up to a challenged law enforcement action, in combination with other circumstantial evidence, can support a finding that the officer who took the action was motivated by racial discrimination. See, e.g., *Rodriguez v. Barr*, 943 F.3d 134, 142-43 (2d Cir. 2019); *Ballew v. City of Pasadena*, 2022 U.S. Dist. LEXIS 233385, *21-22 (C.D. Cal. Nov. 23, 2022); *Commonwealth v. Long*, 152 N.E.3d at 739-40; *Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1169 (10th Cir. 2003). For example, evidence that the officer knew the civilian's race prior to taking the challenged law enforcement action can, in combination with other evidence, support an inference that the challenged law enforcement action was racially motivated. See *Ballew*, 642 F.Supp.3d at 1165; *Long*, 152 N.E.3d at 740 n.9.; *Marshall*, 345 F.3d at 1169 (**Board Review 18**).

In addition, evidence that an officer took enforcement action against an individual of a particular demographic group but not against individuals from other demographic groups whom the officer observed engage in the same or very unlawful conduct can be strong circumstantial evidence of that officer's discriminatory motive. See *Floyd v. City of N.Y.*, 959 F.Supp.2d at 633, 677 (**Board Review 15**); *D.H. v. City of N.Y.*, 309 F.Supp.3d 52, 74 (S.D.N.Y. 2018); *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) (**Board Review 32, Board Review 33**).

Sgt. Wesh stated he perceived § 87(2)(b) to be a Black male (**Board Review 13**) § 87(2)(g)

§ 87(2)(g) Sgt. Wesh's body-worn camera footage depicts Sgt. Wesh stopping two other non-Black individuals for hopping the turnstile, one of whom was also summonsed, prior to initiating the stop of § 87(2)(b) for the very same conduct. (**Board Review 02** at 00:48-4:30)minutes in the recording).

§ 87(2)(g)

- (iii) *the falsity of the officer's non-discriminatory explanations for their actions*

The falsity of a law enforcement officer's race neutral explanation for their actions can also support a finding that the officer was trying to conceal a discriminatory motive. *Turkmen v. Hasty*, 789 F.3d 218, 256-57 (2d Cir. 2015), *rev'd on other grounds*, 137 S.Ct. 1843 (2017); *Rodriguez v. Barr*, 943 F.3d at 143. (**Board Review 20**).

Sgt. Wesh stated he stopped § 87(2)(b) because he observed him jump the turn-style, which is consistent with § 87(2)(b) statement to the investigation and with Sgt. Wesh's body-camera footage. § 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

- (iv) *officer's violation of law and/or department policies and procedures during the incident in question.*

The fact that a law enforcement action was taken in violation of the law (e.g., arrests, searches and traffic stops made without probable cause, investigatory stops made without reasonable suspicion, etc.) can, in combination with other circumstantial evidence, support a finding that such action was racially motivated. *Rodriguez v. Barr*, 943 F.3d at 143; *Millan-Hernandez v. Barr*, 965 F.3d at 148; *Feliz v. City of N.Y.*, 2022 U.S. Dist. LEXIS 26129, *28 (S.D.N.Y. Feb. 14, 2022). Similarly, actions taken in violation of police department policy may suggest that the subject officer acted with a discriminatory purpose. *See Rodriguez*, 943 F.3d at 142; *Commonwealth v. Long*, 152 N.E.3d at 740 n.12. (**Board Review 18**).

As discussed above, Sgt. Wesh § 87(2)(g) withdrew his pepper spray, withdrew his taser, and arrested § 87(2)(b) even after verifying § 87(2)(b) name and address on the scene. § 87(2)(g)

§ 87(2)(g)

- (v) *data showing a pattern of racial disparities in the officer's enforcement activity over time*

Data showing a pattern of racial disparities in a police officer's enforcement activity over time are widely recognized as important circumstantial evidence to consider in a "totality of the relevant facts" analysis of an allegation of racial profiling against that officer. *See, e.g., Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1168 (10th Cir. 2003); *Anderson v. Cornejo*, 284 F.Supp.2d 1008, 1050 (N.D. Ill. 2003); *U.S. v. Hare*, 308 F.Supp.2d 955, 992 (D. Neb. 2004); *Johnson v. Holmes*, 782 Fed.Appx. 269, 281-82 (4th Cir. 2019); *Commonwealth v. Long*, 152 N.E.3d 733, 739-40 (Mass. 2020). (**Board Review 16**).

The incident under investigation involved a stop for fare evasion, arrest, and alleged use of excessive force. We, therefore, analyzed TAB summons, arrest, and TRI data provided by the NYPD for the subject officer, Sgt. Wesh, and for all other members of his command.

Between May 12, 2022, and May 12, 2023, Sgt. Wesh completed zero arrest reports, issued zero TAB summonses, and completed one TRI report. The TRI report relates to an incident involving a Black, female civilian during which a hand strike, takedown, and pepper spray were used and

members of service wrestled/grappled. (**Board Review 17**). The investigation therefore did not obtain sufficient enforcement data to draw any conclusions regarding any patterns of racially disparate enforcement of transit rules by Sgt. Wesh. § 87(2)(g)

- (vi) *officer history of prior biased acts or similar misconduct committed against persons from the complainant/victim's racial/ethnic group*

Likewise, “proof of prior discriminatory conduct” by an alleged discriminator against members of the complainant’s demographic group “is relevant to their motive and intent at the time of the acts at issue here,” *Open Housing Ctr v. Kings Highway Realty*, 1993 U.S. Dist. LEXIS 15927, *18-21 (E.D.N.Y. Nov. 8, 1993), especially if the prior conduct “is similar in nature to that experienced by the [complainant].” *Zubulake v. UBS Warburg, LLC*, 382 F.Supp.2d 536, 544. (S.D.N.Y. 2005); *Todaro v. Siegel, Fenchel & Peddy, P.C.*, 2008 U.S. Dist. LEXIS 17894, *13 (S.D.N.Y. Mar. 3, 2008). (**Board Review 17**).

The investigation requested from the prior NYPD IAB biased policing and EEO complaints made against Sgt. Wesh. The request returned negative results. (**Board Reviews 21, 22**).

The investigation requested any prior adverse credibility determination made against Sgt. Wesh. The request returned negative results. (**Board Review 23**).

The investigation obtained the Central Personnel Index for Sgt. Wesh, which did not demonstrate any relevant pattern. (**Board Review 23**).

The investigation obtained Sgt. Wesh’s prior employment evaluations, which did not demonstrate a relevant pattern. (**Board Review 23**).

Sgt. Wesh also has no prior substantiated CCRB complaints. (**Board Review 10**).

§ 87(2)(g)

- (vii) *Summary of Evidence and Recommended Dispositions*

As discussed above, while Sgt Wesh perceived that § 87(2)(b) was Black prior to stopping him for fare evasion, § 87(2)(g)

§ 87(2)(g)

Civilian and Officer CCRB Histories

- This is the first CCRB complaint to which § 87(2)(b) has been a party.
- Sgt. Wesh has been a member of service for 11 years and has been a subject in four CCRB complaints and nine allegations, none of which were substantiated. § 87(2)(g)

§ 87(2)(b)

Mediation, Civil, and Criminal Histories

- This complaint was not suitable for mediation.
- As of July 31, 2024, the New York City Office of the Comptroller has no record of a Notice of Claim being filed in regards to this incident (**Board Review 11**).
- [§ 87(2)(b)] [§§ 86(1)(3)&(4)] [§ 87(2)(c)]

§ 87(2)(b) [§§ 86(1)(3)&(4)] [§ 87(2)(c)]

Squad No.: Bias 1

Investigator:	<u>Brooke Lewis</u>	<u>Brooke Lewis, Inv. Atty.</u>	<u>August 9, 2024</u>
	Signature	Print Title & Name	Date

Squad Leader:	<u>Carlmais Johnson</u>	<u>IM Carlmais Johnson</u>	<u>August 13, 2024</u>
	Signature	Print Title & Name	Date

Reviewer:	<u>Darius Charney</u>	<u>RPBP Dir. Darius Charney</u>	<u>August 14, 2024</u>
	Signature	Print Title & Name	Date